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NO.

in the
Supreme Court
of the
United States

WILLIAM LUCCI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES OF AMERICA

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QUESTIONS PRESENTED

WHERE A PERSON IS APPROACHED AND QUESTIONED BY NARCOTICS AGENTS IN AN AIRPORT, AND SUCH INITIAL CONTACT RESULTS IN TRUTHFUL ANSWERS, COOPERATION AND, ULTIMATELY, THE ELIMINATION OF ANY SUSPICIONS THAT THE AGENTS MIGHT HAVE HAD, A SECOND STOP, WITH NO NEW INFORMATION, IS INHERENTLY COERCIVE, AND SUCH STOP FATALLY TAINTS A RESULTANT DISCLAIMER OF OWNERSHIP OF LUGGAGE.

AN ALLEGED DISCLAIMER OF OWNERSHIP OF LUGGAGE MADE BY A PERSON STOPPED A SECOND TIME, AFTER THE FIRST STOP PRODUCED NO INFORMATION TO SUPPORT REASONABLE SUSPICION, AND, IN FACT, THE FIRST STOP DISPELLED SUCH SUSPICION, MUST BE VIEWED AS AN ATTEMPT TO TERMINATE THE SECOND STOP, OR, AT BEST, AS A COERCED RESPONSE – SUCH DISCLAIMER CERTAINLY IS NOT A FREE AND VOLUNTARY WAIVER OF THE REASONABLE EXPECTATION OF PRIVACY IN THE LUGGAGE.

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To: The Honorable Chief Justice and Associates Justices of the Supreme Court of the United States.

Petitioner, William Lucci, prays a Writ of Certiorari issue to review a final judgment of the Sixth Circuit

Court of Appeals of the United States affirming judgment and sentence imposed upon the Petitioner, after trial, in the United States District Court for the Eastern District of Michigan, adjudging Petitioner guilty of Possession with Intent to Distribute Hashish Oil and Conspiracy to Perform the same act.

JUDGMENT AND OPINION OF THE COURT BELOW

In a written opinion, the Sixth Circuit Court of Appeals for the United States affirmed the judgment and sentence imposed upon the Petitioner in the trial court (i.e., United States District Court for the Eastern District of Michigan). The Petitioner filed a timely Motion for Rehearing with the Sixth Circuit Court of Appeals which was denied and, accordingly, the Order and Opinion of the Sixth Circuit Court of Appeals of the United States stands final.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Sixth Circuit Court of Appeals of the United States to be reviewed by this Court were issued on March 25, 1985. A timely Motion for Rehearing was filed on April 3, 1985, with an Order denying the Petition for Rehearing being filed on April 26, 1985, reverting back to the original Judgment, being issued as Mandate and Final Judgment on May 7, 1985.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1257(3) and this Court's Rules 17 through 23.

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment, United States Constitution

STATEMENT OF THE CASE

The Petitioner Lucci was charged by Indictment with Conspiracy to Possess with Intent to Distribute Hashish Oil contrary to U.S.C. §846 and §841(a)(1) and with Possession with Intent to Distribute Hashish Oil contrary to 21 U.S.C. §841(a)(1). The Petitioner moved to suppress the contraband involved in the trial level, in the United States District Court Eastern District of Michigan, with the trial judge denying the Motion to Suppress, based upon his finding that Petitioner Lucci abandoned luggage in which the contraband was found, thereby retaining no reasonable expectation of privacy (standing) upon which to challenge the constutionality and legality of the government's activity involved. The Petitioner then went to trial, and was found guilty by jury of both counts, as charged, was adjudged guilty, and was sentenced to two (2) years by the trial court.

The Petitioner filed a timely Notice of Appeal, and appealed his conviction and sentence, specifically dealing with the suppression issue and the issue of abandonment and standing, to the Sixth Circuit Court of Appeals of the United States of America. The Sixth Circuit Court of Appeals affirmed the conviction and sentence in a written opinion.

REASONS FOR GRANTING THE WRIT

Detectives Green and Gaffney of the Broward County, Florida Sheriff's Office observed the Petitioner and co-defendant Christman arrive at the Fort Lauderdale airport carrying one suitcase each, with the Petitioner having a carry-on bag, and stand in line at the ticket counter, looking around. Detective Gaffney got in line behind the two suspects, and his surveillance was obvious enough to draw the attention of the Petitioner and the co-defendant. The Petitioner was seen to fill out a baggage identification tag in his own name and put it on one of the suitcases, while the co-defendant Christman left the line, changed Canadian currency to America, and returned to the line to purchase the tickets in question.

After checking the suitcases, the Petitioner and Christman walked toward the boarding gate for the flight. Agent Gaffney went ahead to position himself near the jetway of the gate, while Agent Green continued to observe the Petitioner and the co-defendant from behind, overhearing the recognition by the suspects of Detective Gaffney, and observing the suspects walk away from the gate area after receiving their boarding passes. The detectives literally ran after the suspects. The agents, still out of breath, identified themselves, produced badges, and asked to speak to the suspects. Although both suspects seemed nervous, both consented to speak, and both produced identification and airline tickets in their real names. The Petitioner cooperated fully, and, after being advised that the agents were narcotics related officers, gave his consent to search the carry-on bag and checked luggage. The Petitioner and Christman then boarded the plane.

The agents proceeded to the baggage area, and although the luggage was not searched, the agents verified that there were two bags which bore the names of the suspects and the matching claim check tickets. No dog was brought in for a sniff test, nor was any odor noticed by the agents. The agents then called ahead to the Drug Enforcement Administration agents working in Detroit (the destination of the Petitioner and Christman), gave a detailed physical description of the suspects as well as the flight number, and the DEA agents were informed that there was a suspicion that the men were drug couriers.

In Detroit (in late December), the Petitioner was observed to have put on a sweater as he left the airplane, walked halfway down the concourse and stopped at a bank of telephones with Christman. The agents in Detroit had absolutely no trouble identifying and observing the rather large and distinct looking suspects, and, in fact, followed them outside the terminal, curbside, where the suspects were approached by a number of agents who identified themselves as such. After again producing their airline tickets and identification and answering preliminary questions, the Petitioner was asked whether or not he had checked baggage, and he denied having such baggage at that time. Instead of being allowed to leave, the Petitioner was then taken, with the co-defendant, to a clearly marked DEA office on the second floor, where they were questioned by at least three and sometimes four agents, until another agent retrieved the checked bags and brought them to the office. Although a variety of computer checks by the agents proved negative on both suspects, the suspects were told to sit down the one time they attempted to leave the office. When confronted in the small DEA

office with the bags, which still bore the name tags in their proper names, Petitioner and Christman again denied ownership of the bags. The suspects were allowed to leave, and the bags were held for several hours until a dog was finally secured to sniff the bags, leading to eventual warrant and search of the bags.

While Petitioner Lucci recognizes the precept that an initial contact between police officer and suspect, where the suspect is simply asked if he would step aside and talk with the police officer, is the type of consentual encounter that implicates no Fourth Amendment interest, *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, (1983), it is equally clear that such contact can, and often does, ripen into a seizure when the actions of the police officers, viewed through the eyes of a reasonable person, amount to a curtailment of the suspect's liberty, leading that reasonable person to believe he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, (1980).

The first stop of the Petitioner, at the Fort Lauderdale airport, resulted in cooperation by the Petitioner, the production of identification and an airline ticket in his correct name, truthful answers, and a consent to search both his carry-on bag and his checked luggage. The Fort Lauderdale officers learned absolutely nothing that would further their suspicions, and, in fact, any questions that they originally had about the Petitioner should have been satisfactorily answered by the initial contact, However, even after examining the checked luggage in Fort Lauderdale and noticing no discrepancies, (identification tag in the correct name)

and noticing nothing suspicious about the bag (no odors, etc.), the Fort Lauderdale officer still called ahead to Detroit and proclaimed his suspicions of the Petitioner, directly causing the second stop at curbside at the Detroit airport.

Although they observed nothing that would add to a suspicion, the Detroit agents stopped the Petitioner en masse, brandishing identification and badges. This second stop of Petitioner tainted all that followed, including the supposed disclaimer of baggage.

While a reasonable man could conceivably feel that he was free to go during the first contact in Fort Lauderdale (notwithstanding the running officers), it is simply not realistic to conclude that any person would feel that they were free to leave and terminate the conversation during the second stop at curbside. Certainly, the successive stops of an individual based on the same information strongly indicates a finding that an arrest has taken place. *United States v. Morin*, 665 F.2d 765 (U.S.C.A. 5th Circ. 1982), page 769. Consequently, the coercion inherent in the successive stop situation must be acknowledged. Certainly, the disclaimer of Petitioner Lucci of his bags must be viewed in light of the successive stops made by government agents, in light of the coercion inherent in such stops, and, most importantly, must be seen as Petitioner Lucci's perception of his only way to attempt to end the interrogation. The alleged verbal disclaimer of the Petitioner was certainly not a free and voluntary relinquishment of property interest in his bags, but was the product of police misconduct and a lay person's attempt to terminate a situation. *United States v. Morin*, 665 F.2d 765 (U.S.C.A. 5th Circ. 1982), page 770. The verbal disclaimer of ownership by the

Petitioner Lucci was no more a free and voluntary abandonment of his expectation of privacy than was the physical act of throwing his shoulder bag in *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752 (1980). Although this Court reversed *Reid*, based upon the lack of factors justifying an investigatory stop at the airport, and did not specifically address the question of abandonment, it is significant that the search of the bag was not salvaged or upheld on the theory that Reid had given up standing in the bag. It can only be assumed that the standing question was not raised in *Reid*, and, consequently, the effect of the police conduct on the physical abandoning of the bag was never discussed.

Petitioner Lucci had the right to terminate the supposed contact at the Detroit curbside at any time. However, when he attempted to do so in the only way that he saw as an option to him, by disclaiming the bag and thereby ending the interest and conversation, this attempt to terminate the contact was ignored, and, in fact, was misused against the Petitioner in the improper finding that he had freely and voluntarily waived his standing in the bags, or that he disclaimed ownership in the bags. Conversely, if the curbside occurrence was, in fact, a seizure, Petitioner Lucci was effectively in custody for purposes of interrogation, and incriminating responses were deliberately elicited from him without a warning of his rights. See *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1686, (1980).

CONCLUSION

In conclusion, it is clear that the Opinion of the Sixth Circuit Court of Appeals of the United States is in conflict with other Circuits in the country regarding the effect of successive stops of a person in an airport on the same information, and this Court, in a matter of great importance to the public, should resolve this conflict and draw specific guidelines dealing with alleged disclaimers of property. Specifically, the alleged disclaimer by Petitioner Lucci at the Detroit airport was not only the product of the coercion inherent in the successive stops at two separate airports, and thus fatally tainted, but, was actually an attempt by Lucci to terminate the contact with the agents, and cannot reasonably be construed as a free and voluntary relinquishment of his reasonable expectation of privacy and standing to contest the constitutionality of the government's actions.

Respectfully submitted,

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Appendix

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-1055

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v.

William Lucci,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 25, 1985

Before: ENGLE and MARTIN, Circuit Judges; and PORTER, Senior District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. William Lucci appeals from his conviction for possession with intent to distribute hash oil and conspiracy to perform the same crime. He argued that the district court improperly failed to exclude the baggage containing the hash oil. We affirm the judgment of the district court.

*Honorable David S. Porter, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

Although the hash oil was seized from Lucci and his traveling companion, Dennis Christman, in Detroit, their first encounter with police was at the Fort Lauderdale Airport, Florida. Broward County Sheriff's Department narcotics agents Richard Green and Stephen Gaffney observed Lucci and Christman purchase tickets to Detroit and label and check their baggage on December 21, 1982.

The agents continued to observe Lucci and Christman, whose nervousness had aroused their suspicions, and the suspects observed Agent Gaffney observing them. When Lucci and Christman saw Agent Gaffney again at the check-in dask just prior to boarding, Lucci told Christman, "There he is," pointing to Agent Gaffney. (There was heresay evidence given at the suppression hearing that Lucci said, "That's him, they're on to us," but Agent Green, the only agent who heard the remark, testified at trial that Lucci said, "There he is.") After Lucci and Christman got their boarding passes, they turned around and started walking toward the exit.

Agent Gaffney ran after the two men and caught up with them near the security checkpoint. He identified himself and asked if they had a minute to speak. They said, "Sure." He asked to see their identification and airline tickets, which they produced. The airline tickets had baggage claim checks, number 182 and 183, affixed to them. Agent Gaffney testified at trial that they were very cooperative, but so nervous that they both had trouble getting their licenses out of their wallets.

Agent Gaffney then asked their permission to check their carry-on baggage. The suspects told him they had

checked baggage and that it would be all right for him to look at their checked baggage. He told them, however, that they had only two or three minutes to catch their plane and he was concerned that they might miss it. After Lucci and Christman boarded their plane, however, Agent Gaffney went to the baggage area and ascertained that the bags with their claim check numbers bore their names.

Agent Gaffney then contacted authorities in Detroit, ultimately speaking with Drug Enforcement Administration Senior Special Agent David McDougal. He gave Agent McDougal detailed descriptions of Lucci and Christman and told him what had transpired at Fort Lauderdale.

Agent McDougal, with DEA Agent Richard Fling and two other narcotics agents, watched Lucci and Christman get off their flight in Detroit. The suspects made a telephone call and appeared to be "scoping," or looking about to see if they were being observed. They then went to curb outside the terminal, instead of proceeding to the baggage claim area as most passengers do.

Agent McDougal went to the baggage claim area, while Agent Fling and the other two agents followed the two suspects outside. There Agent Fling identified himself and the other two agents as police officers and asked to see their identification and airline tickets. The ticket folders had staple holes, but the claim tickets were no longer affixed. Agent Fling asked if they had any checked baggage, and they replied that they did not. Agent Fling told them that this conflicted with information he had; he asked them to accompany him

to the airport DEA office so he could verify his information. They agreed. The agents took the suspects to the DEA office and questioned them there with the door open.

Meanwhile, Agent McDougal waited at the baggage claim area while the passengers picked up their baggage. After the baggage carousel stopped, five bags remained, including the two bags labeled with the suspects' names. Agent McDougal took the two bags with the permission of an airline employee. He sniffed the bags and detected a marijuana-like odor. Agent McDougal testified at the suppression hearing that he could identify marijuana, hashish, and many other narcotics by odor. He qualified at trial as an expert in drug identification and had for ten years been training American and foreign police in drug identification.

Agent McDougal took the bags to the DEA office, where the other agents had been with the suspects for eight to ten minutes. Lucci and Christman both denied ownership or knowledge of the bags. Agent McDougal asked how they could explain their name tags on the bags. Christman answered, "I have no idea," and appeared to have a flip manner; Lucci made no response.

Agent McDougal then asked the suspects if they wanted to talk to a lawyer. Christman answered, "No. I think we just want to leave." Agent McDougal stood up and told them they would have to wait while he talked to an Assistant United States Attorney. He then called the attorney, who told him to let the suspects go until the presence of drugs in the bags could be verified by a dog. Christman and Lucci accordingly were allowed to leave.

A drug-sniffing dog became available several hours later and quickly identified the bags as containing drugs. The bags were searched the next day pursuant to warrant and found each to contain hash oil, about four kilograms altogether. The hash oil had an estimated street value in excess of $300,000. Lucci subsequently was arrested, but Christman remains at large.

Lucci seeks on appeal, as he sought below, to exclude the two bags and their contents from evidence. This and other circuits have recognized, however, that "[o]ne who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private." *United States v. Tolbert*, 692 F.2d 1041, 1045 (6th Cir. 1982) (quoting *United States v. Miller*, 589 F.2d 1117, 1131 (1st Cir. 1978)), *cert. denied*, 104 S. Ct. 337 (1983). *Cf. United States v. Sanders*, 719 F.2d 882, 886 (6th Cir. 1983) (affirmative disclaimer required for privacy right to be lost). Lucci's disclaimer precludes exclusion unless it was prompted by an unconstitutional seizure or arrest. *Tolbert*, 692 F.2d at 1045; *United States v. Morin*, 665 F.2d 765, 770 (5th Cir. 1982).

Lucci argued that there were unconstitutional seizures in both Fort Lauderdale and Detroit. In Fort Lauderdale, however, the officer merely approached the suspects and asked them routine, nonthreatening questions. At the conclusion of the brief interview, he allowed them to continue on their way, notwithstanding that they had consented to search of both their carry-on and their checked baggage. This sort of brief encounter is not a seizure. *United States vs. Collis*, 699 F.2d 832, 835 (6th Cir.), *cert. denied*, 103 S. Ct. 3088 (1983); *Tolbert*, 692 F.2d at 1046. The fact that Agent Gaffney ran to

catch the suspects before they left the terminal does not, on these facts, change our conclusion.

There was in fact a seizure at curbside in Detroit; when Agent Fling and the two other police officers asked the suspects to accompany them to a DEA office, they could not reasonably believe they were free to leave. *Tolbert*, 692 F.2d at 1046; *United States v. Jefferson*, 650 F.2d 854, 856 (6th Cir. 1981). But this sort of brief investigatory detection is permissible if supported by a reasonable and articulable suspicion of criminal activity. *Tolbert*, 692 F.2d at 1046-47.

The facts here are practically identical to these in *Tolbert*, with only two differences. In *Tolbert*, the suspect was actually departing the airport without her luggage, whereas the suspects here were only standing on the curb outside the terminal. Here, however, the suspects denied possession of luggage to Agent Fling even before the seizure and had removed the baggage claim checks from their ticket folders, when he knew they had checked baggage in Fort Lauderdale. We think this case is even more compelling than in *Tolbert*.

The conviction is affirmed.